Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28443
THIRD DIVISION Docket No. MW-26776
90-3-85-3-534

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when outside forces were used to construct signs beginning on or about June 1, 1984 (System File M-42/013-210-52).

(2) The Agreement was further violated when the Carrier did not give the General Chairman prior written notification of its plan to assign said work to outside forces.

(3) Because of the aforesaid violations, Painter D. B. Weigel shall be compensated at the applicable rate for all time lost."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

A Claim was filed by the Organization with the Carrier at Portland, Oregon on grounds that the Carrier was in violation of Rules of the Agreement when it contracted out the fabrication of various signs to be used along its right-of-way and on its property. In denying the Claim, the Carrier argued that the type of work in question was not covered by Rule 52 which is the subcontracting clause of the Agreement.

Although the Organization cites various Rules in the filing and processing of the Claim, a review of the record shows that the resolution of the dispute revolves around provisions of Rules 3, 4, 8 and 52 of the Agreement. These Rules state, in pertinent part, the following. Rule 3 establishes a Bridge and Building Subdepartment within the Maintenance of Way and Structures Department, and Rule 4 establishes Bridge and Building Sign and Shop Painters as a subset of Group 5 as a Class under that Seniority Group. Rule 8 addresses the work of the Bridge and Building subdepartment and states that such work will consist in the "...construction, maintenance and repair ...of signs and similar structures...." Section III(a) of Rule 8 then says that a B&B Sign and Shop Painter shall do "...(l)ettering, cutting stencils, varnishing, graining cabinets, desks, furniture, etc..." as well as "...sandblasting and painting (of the) interior of steel tanks." Rule 52, which specifically addresses the issue of subcontracting, states:

> "(a) By agreement between the Company and the General Chairman work customarily performed by employes covered under this Agreement may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.

(b) Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

(c) Nothing contained in this rule requires that notices be given, conferences be held or agreement reached with the General Chairman regarding the use of contractors or use of other than maintenance of way employes in the performance of work in emergencies such as wrecks, washouts, fires, earthquakes, landslides and similar disasters.

(d) Nothing contained in this rule shall impair the Company's right to assign work not customarily performed by employes covered by this Agreement to outside contractors."

As a factual matter, the Carrier did assign the Claimant to construct and stencil signs with such messages as "Private Property-No Trespassing," "Private Roadways" and so on. According to the record the Claimant had been instructed to do some 40 signs, but after he completed 12 of them he was instructed to do something else. No work was lost by the Claimant because the Carrier contracted out the work of fabricating the rest of the signs.

The Organization argues that this work belonged to the craft under various Rules of the Agreement and secondly, if the Carrier did want to subcontract the fabrication of the signs it was obligated to give advance notice in accordance with Rule 52. Under Rule 52(a) the time-frame for such notification is fifteen (15) days. The Carrier argues, on the other hand, that the work in question had never been done before by the craft but had always been subcontracted out to outside fabricators and that such signs were available at all times in the Carrier's storeroom. This practice, according to the Carrier, dated back to the early 1900's.

Resolution of the instant dispute centers, first of all, on whether sign-making of the type in question was traditionally contracted out by the Carrier and whether it fell under the umbrella of what Rule 52 calls a "prior and existing practice." According to the record on property, at least, this was the only instance of B&B Painters doing this kind of work, which became the basis for the Claim in the first place. In its appeal of the Claim, the Organization can state no more than the following with respect to this evidentiary point:

> "...(the Claimant) was instructed to construct/ paint eighty (80) signs indicating various messages...(and) after completing the fabrication of twelve (12) of the signs requested, (the Claimant) was instructed...to discontinue this work as it would be handled by outside contractors from that point on. Such work has customarily and traditionally been assigned to and performed by the employees of the Bridge and Building Subdepartment. Evidence of this is the fact (that the Claimant) made twelve (12) of the signs in question...."

The Carrier, on the other hand, offers persuasive arguments in its letter of December 21, 1984, to the Organization, which are insufficiently rebutted by the Organization, to show that it was a prior and existing practice since the early 1900's for the Carrier to contract out the fabrication of the type of signs in question. As moving party to the Claim the burden lies with the Organization to present substantial evidence of a past practice to the contrary (Third Division Awards 15765, 22292, 22760 inter alia). On the basis of the record as a whole, that burden has not been met.

It is unclear to the Board why the Carrier assigned the painting of these types of signs this one instance to a B&B Painter after having had signs of this type fabricated by outside sign companies for many years. Such one instance, in the mind of the Board, is not sufficient to invalidate the Carrier's argument about prior practice with respect to such signs. Conceivably, if the Carrier would continue to assign such work in the future to B&B Painters, the Organization would have a more solid case for future claims dealing with jurisdictional rights over this type of work. The evidence in the record on this case does not support the conclusion, however, that the work falls under the Scope of the Agreement. This case points only to one idiosyncratic instance. Such does not constitute a practice.

There is a second question associated with this Claim with which the Board must deal. Once the work was assigned to a B&B Painter, and then partially contracted out, was the Carrier obliged to observe the fifteen (15) day notice? The fifteen (15) day notice requirement is logically related to whether the work customarily falls under the jurisdictional rights of the craft if one only limits oneself to Rule 52(a). The Carrier hangs its hat on this argument. Subsections (b) and (d) of Rule 52 state, on the other hand, that if any contracting is going to be done, the Carrier is required to "give advance notice," and that nothing impairs the Carrier's "right to assign work not customarily performed by employees covered by this Agreement to outside contractors." The latter is what the Carrier did. Advance notice is required, therefore, whenever any contracting is done, whether the work is "customarily

performed" or not. Are there any exceptions? Yes. These are laid out in Rule 52(c). Notice of subcontracting does not have to be given, nor conferences held, nor any agreement reached between the Carrier and the Organization "...in emergencies such as wrecks, washouts, fires, earthquakes, landslides and similar disasters." Are any of these applicable to the instant Claim? No. Therefore, the Carrier was required to give advance notice whether the work was customarily performed by employees or not when work was contracted out.

Such conclusion is consistent with prior Awards issued by the Board when ruling on subcontracting disputes between this craft and Carrier. For example, Third Division Award 23578 states:

> "Rule 52 uses the mandatory term, 'shall' and notice is required regardless of whether or not the erection of earth mounds for signal facilities (in that case) is historically, traditionally, and customarily performed by Maintenance of Way employees." (emphasis added)

This Award cites earlier Third Division Awards 18305 and 18687 for support. Third Division Award 23354 arrives at a similar conclusion when it states:

> "...For (a) Carrier to ignore (the notice requirements outlined in Rule 52) because it either thinks that the work to be performed by (an outside contractor) is not work exclusively reserved to covered employees...is unacceptable."

Third Division Award 27011 also concludes in a case involving these same parties:

> "...While there may be valid disagreement as to whether the work at issue was customarily performed by the equipment operators (in that case), Carrier may not, as a general matter, put the cart before the horse and prejudge the issue by ignoring the notice requirement (found in Rule 52)."

The last issue to be resolved by the Board, in view of the Carrier's violation of the notice requirements of Rule 52, deals with relief. There is a long line of Awards issued by the Board dealing with the interpretation of Rule 52 when disputes have arisen between these parties. Such Awards have generally concluded that precedent:

"...precludes (the Board) from providing (Claimants) with pecuniary relief where they have not proved loss of work opportunity or loss of earnings due to the Carrier's failure to tender the required notice unless the Carrier has flagrantly or repeatedly failed to comply with Rule 52." (Third Division Award 23578; See also Third Division Awards 23354, 20275, 20671, 18305 and more recently, 26174, 26422).

The Board cannot find sufficient evidence of record to warrant diverging from such precedent in the instant case.

After studying the Submissions the Board must also conclude that there are materials and arguments contained therein which were not part of the exchange on property. On basis of prior rulings this Board cannot use such information in framing its conclusions on a Claim and has not done so in the instant case (See Third Division Awards 21463, 25575, 26257; Fourth Division Awards 4112, 4136, 4137).

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of June 1990.

CARRIER MEMBERS' CONCURRENCE AND DISSENT
TO
AWARD 28443, DOCKET MW-26776
(Referee Suntrup)

The Referee was clearly correct in concluding that the work involved in the dispute was not covered by the Scope Rule of the Agreement and that the evidence of past practice supported the Carrier's right to contract out the work. The Referee also was correct in finding that the notice requirement of Rule 52(a) applies only to work customarily performed by members of the Organization and that no notice under Rule 52(a) was required here. So far so good.

The Referee concluded with the holding that while notice was not required under Rule 52(a), it was required under Rules 52(b) and 52(d). The problem with this last holding is that there is no independent notice requirement under Rule 52(b) or (d). The fact that no notice requirement arises from Rule 52(d) is self-evident. Rule 52(d) does not contain the word "notice" or refer to the subject in any manner. Rule 52(b) does refer to the subject of notice but, here too, it is self-evident that the reference is to the portion of the Rule where the notice requirement is spelled out, i. e., Rule 52(a).

The Referee cites three Awards as support for his position. They do not do so. Third Division Award 23578, which involved the parties to this dispute, ruled that notice was required because of the use of the word "shall" in Rule 52. The word "shall" appears only in Rule 52(a), it

does not appear in Rule 52(b) or (d). Third Division Award 23354 involves a different Carrier and a contracting out Rule that bears no resemblance to Rule 52. Finally, Third Division Award 27011, which involved the parties to this dispute, totally invalidates the Referee's conclusion. The Board there did find the Carrier violated the notice provision of Rule 52 and stated, "...it is clear the Carrier failed to provide proper notice...in violation of Rule 52(a)."

In summary, the Referee's finding of a notice requirement existing independent of the requirement of Rule 52(a) is to create something from nothing. The Board should have denied the Claim in its entirety.

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga

J. E. Yost

CORRECTED

LABOR MEMBER'S
CONCURRENCE, DISSENT and RESPONSE
to CARRIER MEMBER'S
CONCURRENCE and DISSENT to
AWARD 28443, DOCKET MW-26776
(Referee Suntrup)

Since this Award was sustained in part, a concurrence is required. However, such concurrence is limited only to the recognition by this Referee that the Carrier is required to give the Organization advance notice prior to it contracting out Maintenance of Way and Structures Department work. The remainder of the Award is nonsensical and palpably erroneous.

Moreover, since the Referee held that the Carrier was required to give notice, he succumbed to the pleading of poverty from the Carrier and did not award monetary damages to the Claimants. The rationale used was that of unproven loss of work opportunity and no showing of this Carrier to be a repeated violator of the notice provision. This Carrier has systematically violated the Agreement with the pronouncement of its intent to eliminate two of the Departments covered by the Agreement. Anytime Maintenance of Way work is contracted out there is a loss of work opportunity. Common sense makes that obvious even to the most casual observer. Ironically, this Referee chose to quote from Third Division Award 23578 which included the language referring to a repeated violator. However, he did not quote the last paragraph of the Award which for ready reference reads:

> "While we must deny the Claimant's request for monetary damages, we expect the Carrier, in the future, to fully and properly comply with the Rule 52 notice provisions."

This Award was adopted in March, 1982. Third Division Award 26174, adopted on October, 1986, held:

> "At the same time, we are also persuaded by the decision in Award 23354, that compensation must be denied because all affected employes are fully employed and suffered no loss. This is a position that has long been applied in the industry and we find no basis for ruling to the contrary. This is not to say, however, that there is no merit to the Organization's contention that flagrant and continued disregard of the Carrier's responsibility to provide proper notification should result in the sustaining of a monetary Claim. It is an argument that warrants attention and we will continue to consider in it the future."

Third Division Award 27011, adopted on April 25, 1988, held:

> "***Accordingly, it is our judgment that the Board herein is limited to directed Carrier to provide notice in the future, just as in Third Division Award 26301."

At present, there are thirty seven (37) contracting out of work Dockets pending before the Third Division involving this Carrier and Organization. Of those 37 Dockets, the Carrier failed to give the Organization notice in thirty one (31). So for this Carrier, it is business as usual - violate the Agreement knowing that a hand slap will follow. There is more than ample precedent for awarding monetary payment for an Agreement violation and the time is past due for this and all other Referees to so hold.

It appears that the Referee based his convoluted decision on a Carrier proffered past practice. However, during the handling of the dispute on the property, the Carrier chose no to present any

evidence of past practice. While in the last paragraph of the Award, the Referee decreed that, "this Board cannot use such information in framing its conclusions on a Claim," he apparently considered and gave considerable emphasis to the two-inch thick stack of paper added to the Carrier's submission as an alleged evidence of a past practice. Notwithstanding decrees of well-established Board principles, this Award is based strictly on an unsubstantiated practice and consequently without precedential value.

Without deference to the Carrier Members Dissent concerning the application of Rule 52, I will limit my response to the Carrier Members' Concurrence, i.e., that the work involved in this dispute was not scope covered. Balderdash! Rules 3, 4 and 8 clearly and unambiguously reserve lettering and cutting stencils to Bridge and Building Sign and Shop Painters and that was the work performed here.

Long ago, this Board considered precisely the same Scope Rule and Work Reservation Rules on this property and determined that said rules were **NOT** general, but that they constituted a specific grant of work to the involved employes. In this connection, we invite attention to Award 14061 (UP), which, insofar as it is pertinent hereto, held:

> **"OPINION OF BOARD:** Carrier, about September 3, 1963, contracted out repair of the roof of its roundhouse at Green River, Wyoming. The work, according to Carrier, involved approximately 10,000 square feet of roof and consisted of 'tearing off of the old roofing to the sheathing, replacement of layer of 15 lb. felt, installation of new gravel top, mopping of two layers of 15 lb. felt, then mopping of 1 layer

of 65 lb. cap sheet, and, finally, a brushing with aluminum coating.' The Organization alleges that the Agreement reserved this work to B&B Carpenters.

* * *

Carrier argued:

1. This is a Scope Rule case. The Scope Rule is general in nature. The Organization has failed to prove that customarily the employes represented by the Organization have, exclusively, performed work of the nature here involved;

2. In a Memorandum of Understanding dated November 18, 1943, Carrier was vested with the right to contract out the work here involved;

3. Our Award No. 8184, involving the parties herein, in which claim was denied, is binding precedent; and, Awards Nos. 21 and 23 of Special Board of Adjustment No. 313, on this property, compel us to deny the Claim herein; and,

4. Because all B&B Carpenters in the seniority district were employed at the time the work contracted out was done, the Claimants--even if a violation be found--have not been damaged.

RESOLUTION

* * *

2. Scope Rule-Grant of Work

We are not confronted with interpretation and application of a Scope Rule general in nature. The Claim is founded on an alleged breach of the Agreement effective May 1, 1958. Rule 3 of the Agreement specifically grants work of the nature here involved, as follows:

> 'NOTE 9: Classification of Work-Bridge and Building Department: The work of . . . maintenance and repair of buildings . . . **shall** be performed by employes in the Bridge and Building Department.' (Emphasis ours.)

Usual defenses to failure to comply with such a grant are: (1) emergency; (2) lack of skills; (3) lack of special tools and equipment; (4) size of the project not within the contemplation of the parties at the time of execution of the Agreement; and (5) lack of manpower. Of these, only the last one is a probable defense in this case. We consider it, **infra.**

3. Prior Awards

Carrier cites Award No. 8184 as being dispositive of the issue raised in the instant Claim. In that case 'The Organization took the position that the erection, and painting of the addition to the building was of the type that was contemplated by the Scope Rule of the effective agreement, and as such, to be performed by the employes covered thereby. It was asserted that the work was of a nature that had historically and traditionally been performed by Maintenance of Way forces.' It was concluded in the Opinion in that Award that:

> 'The Scope Rule of this agreement is a general one; it does not enumerate the work covered thereby. However, we are confronted with a special understanding between the parties which concerns the right of this Carrier to assign construction work to others than those covered by the effective Agreement. This "'Memorandum of Understanding was entered into on November 18, 1943, and among other things contained the following provisions:
>
> > "3. The performance of maintenance work by contractors will be curtailed to the extent employes included within the scope of the agreement effective December 1, 1937, are available to perform such work, and the company has necessary equipment.
> >
> > It is understood the company reserves the right to contract projects to the extent that such work was handled by contract during normal conditions."
>
> We are of the opinion that this provision which reserved to the Carrier the right to "contract out" work to the extent that such work was handled by outside forces during normal conditions, granted to the Respondent freedom of action to contract the work in

question. This conclusion is based on the fact that the work in question was an addition to a building which was initially constructed by outside forces, and that like initial construction or additions to existing buildings at this location had been "contracted out" under conditions that were there, as here, "normal" within the meaning of such Memorandum of Understanding.'

The alleged violation in Award No. 8184 occurred in October and November, 1953. The Agreement there involved was effective September 1, 1949. The Agreement involved in the instant case became effective May 1, 1958. While both Agreements have appended the Memorandum of Understanding dated November 18, 1943, its force and effect have been diminished by the 1958 Agreement.

In Award No. 8184 we were confronted with interpretation and application of a Scope Rule, general in nature. Not so here, for in the 1958 Agreement a specific grant of the work here involved was agreed to in Rule 3, Note 9, **supra**. This specific grant prevails over the Scope Rule and the 1943 Memorandum of Understanding. It is an elementary principle of contract construction that a later agreement between the same parties prevails in variances with an earlier but continuing agreement.

Even assuming the interpretation that Carrier would give to the 1943 Memorandum of Understanding, Carrier fails to merit its application inasmuch as it did not prove, in the record made on the property, its affirmative defense of 'normal conditions.'

"We find no aid to adjudication of the instant case in Awards Nos. 21 and 23 of Special Board of Adjustment No. 313." (Emphasis in bold in original)

The afore-quoted award, rendered December 22, 1965, held that the Scope Rule involved here was NOT general but that with the implementation of the May 1, 1958 Agreement, "*** a specific grant of the work here involved was agreed to ***" The Scope Rule and work reservation rules of the current Agreement (January 1, 1973 Agreement) have not been amended in any manner to alter

the effect of the reasoning of Award 14061.

In addition, it should be made clear that Rule 8 is much more than a "Classification of Work Rule", as the Carrier alleges in most of its disputes involving the contracting out of work. While it is clear that sections (1) through (4) to Rule 8 list the duties of classes of employes within the Bridge and Building Subdepartment, the first paragraph of Rule 8, Section 3 is clearly and unambiguously a WORK RESERVATION RULE. Moreover, a review of Rule 4 reveals that said rule clearly lists the seniority groups and classes established for the various subdepartments. Rule 4 is a work classification rule. Again, support for our position in this regard is readily found from a review of the opinion in Award 14061.

Hence, to say this Award is located somewhere in "left field" is an understatement. The reasoning and decision in Award 28443 is erroneous and without precedential value.

Respectfully submitted,

D. D. Bartholomay
Labor Member

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S CONCURRENCE, DISSENT AND RESPONSE
AWARD 28443, DOCKET MW-26776
(Referee Suntrup)

The purpose of this Response is to comment on one point made in the Organization Member's emotional Dissent. The Dissent refers to Third Division Award 14061 as decisive authority that the parties' Classification of Work Rule is, in effect, a part of the Scope Rule. Indeed, the Labor Member is so enamored of the Award that he quotes from the Award at great length.

The Labor Member begins his discussion of the Award with the assertion that Award 14061 involves "precisely the same Scope Rule and Work Reservation Rules on this property." He made the same argument and assertion before the Referee in this dispute. He argued his position at length and with great vigor. As can be seen from the Award in this case, not only did the Referee totally reject the Organization position, he thought so little of it that he did not believe it worthy of mention in the Award.

The reasons for the Referee's rejection of the position no doubt stemmed from the Carrier position in opposition. The Carrier pointed out that, contrary to the Organization assertion, the Scope Rule and Classification of Work Rule are not the same as the Rules in effect at the time Award 14061 was decided. Such fact is patent when one considers

that Award 14061 finds Note 9 to Rule 3 of the Agreement before it to be most significant while in the current Agreement neither the Scope Rule nor the Classification of Work Rule is found in Rule 3, and there is no Note 9 in the Agreement. Indeed, it is noteworthy that Award 14061 itself refused to rely on a still older Award on the property because such older Award had arisen at a time when the Agreement in effect was not the same as the Agreement before it.

In addition, the Referee here no doubt found it highly significant that notwithstanding dozens of disputes between the parties which had arisen under the Agreement now in effect, which involved the same issue involved here, the Organization had <u>never</u> raised Award 14061 as relevant, let alone dispositive, of this critical issue.

Finally, the Referee no doubt was further persuaded by prior precedent of this Board that has consistently held that Classification of Work Rules within Maintenance of Way Agreements are <u>not</u> considered to be part of the Scope Rule. See, for example, Third Division Awards 27759, 22144, 20841, 13638.

The resurrection of Award 14061 represented a desperate last ditch effort to convince the Referee of the efficacy of the Organization position. The Referee obviously believed that the appropriate method of dealing with the Award was to return it to its resting place.

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga

J. E. Yost